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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

ORIGINAL COPY

No. 79-6423

ABBY GAIL LASSITER

PETITIONER,

v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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10

INDEX

STATEMENT OF THE CASE

REASONS FOR DENYING THE WRIT

I. THIS CASE, AND THE ISSUE PRESENTED TO THIS COURT, IS CLEARLY DISTINGUISHABLE FROM IN THE MATTER OF OTIS, 48 L.W. 3290 (OCTOBER 30, 1979), WHICH WAS REMANDED TO THE OHIO SUPREME COURT PRIOR TO DECISION BY THIS COURT. . . . . .

II. THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS CONSISTENT WITH ALL PRIOR DECISIONS OF THIS COURT AS TO THE DUE PROCESS REQUIRED IN MATTERS INVOLVING FAMILY INTEGRITY. 5

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES ONLY NOTICE AND OPPORTUNITY TO BE HEARD, AND NOT APPOINTMENT OF COUNSEL, IN A PURELY CIVIL PROCEEDING TO TERMINATE PARENTAL RIGHTS. 10

CONCLUSION 13

APPENDICES

OHIO REVISED CODE §215.352 AND §2151.353 . . . . . A

NORTH CAROLINA GENERAL STATUTES §7A-542, §7A-543, §7A-544, §7A-561 . . . . . B(1)

NORTH CAROLINA GENERAL STATUTES §7A-516, §14-316.1, §14-318.4. . . . . B(11)

NORTH CAROLINA GENERAL STATUTE §7A-289.28. C

NORTH CAROLINA CONSTITUTION ARTICLE IV, §13 AND ARTICLE XI, §1 . . . . . D

CITATIONS

CASES:	Page
Betts v. Brady, 316 U.S. 455	12
Boddie v. Connecticut, 401 U.S. 371	8
Crist v. Division of Youth and Family Services, 320 A.2d 203	6
Danforth v. Maine, 303 A.2d 794	6
Davis v. Page, 442 F.Supp. 258	6
Douglas v. California, 372 U.S. 353	3,4,9,11,12
Gideon V. Wainwright, 372 U.S. 335	12
Griffin v. Illinois, 351 U.S. 12	3,4
In Re Gault, 387 U.S. 1	5,12
In Re Robinson, 8 Cal.App.3d. 783, 87 Cal.Rep. 678	5
In The Matter Of Lassiter, 43 N.C.App. 525, 259 S.E.2d 336	2
In The Matter Of Lassiter, 299 N.C. 120, 262 S.E.2d 6	2
In The Matter Of Otis, 48 L.W. 3290	3,4,5
Kaufman v. Carter, 402 U.S. 954	5,6
Meyer v. Nebraska, 262 U.S. 390	8
Munn v. State of Illinois, 94 U.S. 113	10
Parham v. J. R., 442 U.S. 584	10,11
Powell v. Alabama, 282 U.S. 45	12
Prince v. Massachusetts, 321 U.S. 158	8
Smith v. Edminston, 431 F.Supp. 941	6
Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816	6,8
Specht v. Patterson, 386 U.S. 605	12
Stanley v. Illinois, 405 U.S. 645	8,9
State ex rel. Heller v. Miller, 61 Ohio St.2d 6	4
Williamson v. Lee Optical of Oklahoma, 348 U.S. 461	10
Wisconsin v. Yoder, 406 U.S. 205	8

CONSTITUTIONAL PROVISIONS

Constitution of the United States	
Fourteenth Amendment	passim
Constitution of North Carolina	
Article IV, §13(1)	12
Article XI, §1	12

STATE STATUTES — Page

Alabama Code §12-15-63 6
Arizona Revised Statutes §8-225 6
Colorado Revised Statutes §19-1-106(1)(b)(II) 6
District of Columbia Code §16-2304(b) 6
Georgia Code §24A-2001(a) 6
Hawaii Revised Statutes §802-1 6
Idaho Code
§16-1606(c) 6
§16-1608 6
Illinois Revised Statutes, Chapter 37 §701-20(1) 6
Indiana Code §34-1-1-3 6
Iowa Code §232.28 6
Kansas Statutes Annotated §38-820 6
Kentucky Revised Statutes §199.603 6
Louisiana Civil Code Annotated Article 13:1 §602 6
Maryland Courts and Juvenile Procedure Code §3-821 6
Massachusetts General Laws Annotated, Chapter 119 §29 6
Michigan Juvenile Court Rule 6.3(A)(2)(b) 6
Minnesota Statutes §260.155(2) 6
Missouri Annotated Statutes §211.562 6
Nebraska Revised Statutes §43.205.06 6
New Hampshire Revised Statutes Annotated §604A-1 6
New Mexico Statutes Annotated §13-14-25-F 6
New York Family Court Act §1043(a) 6
North Carolina General Statutes
§7A-289.24 7
§7A-289.28 11
§7A-516 7
§7A-542 7
§7A-543 7
§7A-544(c) 7
§7A-547 7
§7A-561(b) and (c) 7,10
§7A-587 6,7
§14-316.1 7
§14-318.4 7
North Dakota Cent. Code §27-20-26 6
Ohio Revised Code
§2151.352 3,6
§2151.353 7
Oklahoma Statutes Title 10, §1109 6
Oregon Revised Statutes §419.498 6
Pennsylvania Statutes Annotated Title 11, §50-317 6
South Carolina Code §17-3-10 6
South Dakota Compiled Laws Annotated §26-8-22-2 6

Page

Utah Code Annotated §78-3a-35..... 6
Virginia Code Annotated §16-1-266C(2)..... 6
Washington Revised Code Annotated §13-34.090..... 6
West Virginia Code §49-6-2..... 6

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DEPARTMENT OF SOCIAL SERVICES OF
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RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Department of Social Services of Durham County, North Carolina, respectfully requests that this Court deny the petition for writ of certiorari, asking review of the North Carolina Court of Appeals' opinion in this case. That opinion is recorded at 43 N. C. App. 525, 259 S. E. 2d 336 (1979).

STATEMENT OF THE CASE

Respondent objects to the Petitioner's Statement of Facts And Proceedings Below, found at pages 7-9 of her Petition because it seeks to introduce into the record on appeal the transcript of the trial of this matter. The Record on Appeal to the North Carolina Court of Appeals submitted by the attorneys for Petitioner and stipulated to by the undersigned counsel for Respondent in January, 1979, omitted any details of the evidentiary hearing. There was no barrier to Petitioner's obtaining a transcript and buttressing her legal arguments to the North Carolina Court of Appeals with recitations from trial proceedings as she now seeks to do. Her failure to do so was a waiver of any objections to the evidence. Respondent was not consulted about preparation of a transcript or its addition to the record to this Court, and was not aware of its existence until seeing the references to it in the Petition for Writ of Certiorari. The Respondent views this as subreption and, therefore, strenuously objects to any reference to the transcript of the hearing in the Petition for Writ of Certiorari.

On April 10, 1978 Respondent filed a Petition seeking the termination of parental rights of Abby Gail Lassiter to the minor, William L. Lassiter in the Juvenile Court of Durham County, North Carolina. This Petition, along with a Summons, was personally served on Ms. Lassiter in Women's Prison, Raleigh, North Carolina on April 12, 1978. She made no response within the time prescribed in the Summons, and as a result of this default, the Petition was set for evidentiary hearing as required by N.C.G.S. §7A-289.28 for June 13, 1978. Ms. Lassiter was served with a Notice of this hearing by registered mail on May 28, 1978. Because this hearing date conflicted with a statewide judicial conference, it was rescheduled for August 31, 1978, notice of which was served on Ms. Lassiter by registered mail on August 11, 1978.

On August 30, 1978, counsel for Respondent requested that the presiding judge call officials at Women's Prison in Raleigh, and direct that Ms. Lassiter be brought to Durham for the hearing. (This information was not originally part of the statement of case on Appeal, but counsel for Respondent was directly questioned about this by Chief Judge Morris of the Court of Appeals during oral argument, and it was specifically referred to in that court's opinion.) Ms. Lassiter appeared at the hearing, cross-examined

witnesses, and testified in her own behalf.

At the beginning of the hearing, the trial judge inquired as to whether or not Ms. Lassiter had legal counsel. This inquiry was initiated by the judge, and Ms. Lassiter did not, at any time, request that he appoint an attorney to represent her. She told the court that she had an attorney to assist her in post-conviction proceedings, that she had been consulting him throughout the pendency of the Petition to terminate her parental rights, and notwithstanding having been served with the Summons, Petition, and two separate Notices of Hearing, had not even mentioned the legal proceeding to him. Considering that these events had spanned four months, the court concluded that Petitioner had had ample opportunity to seek legal counsel, and decided to proceed with the evidentiary hearing.

The evidence adduced at the hearing from the social worker, the Petitioner, and Petitioner's mother substantially proved the allegations in the Petition and the court entered an order terminating the parental rights of Petitioner as being in the best interests of the minor.

Petitioner immediately thereafter contacted the North Central Legal Assistance Program in Durham, and the attorneys in that agency perfected her appeal on the sole question of whether or not the Due Process Clause of the Fourteenth Amendment to the United States Constitution required that the trial judge appoint an attorney to represent her, at state expense, and without legislative authorization, before proceeding with a hearing on the Petition to terminate her parental rights.

The North Carolina Court of Appeals, in considering this sole question, followed the principles of due process previously outlined by this court, and ruled that Ms. Lassiter had been given ample notice and opportunity to be heard and was not entitled to a court appointed attorney at state expense absent leglislative enactment authorizing such. In The Matter Of Lassiter, 43 N.C. App. 525, 259 S.E. 2d 336 (1979). On January 17, 1980, the North Carolina Supreme Court, without opinion, denied her petition for discretionary review In The Matter of Lassiter, 299 N.C. 120, 262 S.E. 2d 6 (1980).

REASONS FOR DENYING THE WRIT

THIS CASE, AND THE ISSUE PRESENTED TO THIS COURT, IS CLEARLY DISTINGUISHABLE FROM IN THE MATTER OF OTIS, 48 L.W. 3290 (OCTOBER 30, 1979), WHICH WAS REMANDED TO THE OHIO SUPREME COURT PRIOR TO DECISION BY THIS COURT.

Initially, Petitioner asserts that this case presents the "almost identical" issue presented to this court in In The Matter of Otis, et al., No. 79-5215, cert. granted, 48 L.W. 3290 (October 30, 1979), vacated and remanded, (February 19, 1980). Respondent submits that there are subtle but substantial differences in the two cases.

In The Matter of Otis challenged the procedure of appeals as of right guaranteed by the state of Ohio, which in its operation, prohibited appeals by indigents in those cases where preparation of an adequate record on appeal required a trial transcript at the indigent appellant's expense. Mrs. Subler, the Petitioner in that case, argued that she could not afford such a transcript and the state court's refusal to require the state to bear the costs of preparing the transcript effectively prohibited her from appealing. She alleged that this was a denial of due process and equal protection guaranteed by the Fourteenth Amendment.

Mrs. Subler had also asked the Ohio Court to appoint counsel at state expense to aid in prosecution of her appeal. She had had the assistance of court-appointed counsel to represent her at trial under the provision of Ohio statute, ORC §2151.352. (See Appendix A). This fact in and of itself put that case in an entirely different posture from this one, but in the same posture as Douglas v. California, 372 U.S. 353 (1963). Due to the lack of authority under Ohio statutes for appointment of counsel for indigents in civil appeals, this request was also denied. She asserted that this denial also violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The questions presented to the Court in In The Matter of Otis, supra, were identical to the issues decided by the Court in Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, supra. The sole distinction is that those two cases involved criminal appeals, and In The Matter of Otis, supra, was a purely civil appeal. Mrs. Subler asked the Court to extend the principles of due process and equal protection outlined in those criminal cases to her civil case on the theory that the family interest is

as fundamental to the individual as the personal liberty interest at stake in criminal proceedings.

In both Griffin v. Illinois, supra, and Douglas v. California, supra, the Court's decisions rested on the fact that the state had already guaranteed criminal appeals but discriminated against the indigent criminal defendants by, in Griffin, effectively preventing appeals where a transcript was required at defendant's expense, and in Douglas, allowing the appeals court to review the indigent defendant's case on the merits before deciding whether counsel should be appointed, while defendants who could retain counsel could more effectively present their cases on appeal initially. But the point to be remembered is that in all three cases, the initial right (appeal) was one guaranteed by acts of the Illinois, California, and Ohio legislatures. The problem was that the mechanisms for exercising that right discriminated against indigents.

In a subsequent decision, the Ohio Supreme Court, relying on Griffin v. Illinois, supra, and Douglas v. California, supra, extended the rights to free transcript and appointed counsel on appeal to the indigent parents in proceedings to terminate parental rights. State ex rel Heller v. Miller, 61 Ohio St. 2d 6 (1980). In light of this ruling, the Writ of Certiorari issued in In The Matter of Otis, supra, was vacated and the case remanded to the Ohio Court.

In the present case, the right asserted (appointment of counsel in a purely civil trial to terminate parental rights) has not been guaranteed by the North Carolina legislature, nor has this Court ever construed the Due Process Clause of the Fourteenth Amendment to require it as a protection of the parent's interest in family integrity.

This case is further distinguishable from In The Matter of Otis, supra, because the Petitioner herein has, with no difficulty and no costs, been able to obtain counsel to perfect her appeal and obtained, at no costs to her, a transcript to assist in the preparation of her appeal to this Court. Petitioner had ample time and opportunity to seek such counsel prior to trial, and had she inquired, the Legal Aid attorneys in Durham would have represented her as ably at trial as they have subsequent to it. Counsel for Respondent has, and continues to, engage in trials of cases where the parent, in the same circumstances as Petitioner, is being represented by

counsel for Petitioner from the North Central Legal Assistance Program in Durham. Thus, counsel was available regardless of a lack of legislative or constitutional mandate to appoint one for her.

Finally, it should be pointed out that the Ohio and North Carolina procedures for termination of parental rights are different. The Ohio procedure in Otis is functionally analogous to North Carolina's procedure for determination of abuse, neglect, or dependency, which, as will be more fully explained hereinafter is different from the procedures for termination of parental rights.

This case is like In The Matter of Otis, supra, only in the fact that both involved a civil trial on the question of termination of parental rights. The issue to the Court in this case is raised by entirely different circumstances, not warranting a grant of a Writ of Certiorari.

II

THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS CONSISTENT WITH ALL PRIOR DECISIONS OF THIS COURT AS TO THE DUE PROCESS REQUIRED IN MATTERS INVOLVING FAMILY INTEGRITY.

Next Petitioner asserts that the decision of the North Carolina Court of Appeals is "against the weight of modern precedent", (Petition, p. 13) and contrary to "an overwhelming majority of the courts" , (Petition, p. 10). Respondent, in answer to this, points out that the only authority binding on the Court of Appeals at the time this case was decided was that defined by the Supreme Court of North Carolina and this Court. Through the writing of this response, neither has required appointment of counsel for indigents in a purely civil proceeding devoid of criminal characteristics and without some legislative expression that such appointment was desired by the people of the state.

In the case of In Re Robinson, 8 Cal. App.3d 783, 87 Cal. Rptr. 678, cert. den. sub nom. Kaufman v. Carter, 402 U.S. 954 (1971), this court was presented with the similar question of appointment of counsel for an indigent parent in a proceeding to determine custody. This court declined to issue a Writ of Certiorari, thereby upholding the California Court of Appeals, which, through Judge Fleming, stated:

> "Gault does not require that the constitutional safeguards of counsel applicable to criminal cases be met in all civil cases. . ., rather it requires counsel in those cases denominated 'civil' which are basically criminal in nature. We view a proceeding to adjudicate the dependency status of a child as a true civil cause,

> comparable in essentials to a child custody controversy between parents, except that the controversy is . . . one between a parent . . . and the state as parens patriae." Kaufman v. Carter, 87 Cal. Rptr. 675, at 680.

This is the last expression of this Court regarding appointment of counsel in a purely civil action to decide some question of family integrity. However, Respondent recognizes that there are several state and lower federal court rulings that require a right to appointed counsel in proceedings (trial or appeal) related to custody of, and parental rights to children. For the reasons that follow, Respondent denies that these represent an "overwhelming majority."

There are now thirty-nine jurisdictions that provide for appointment of counsel for indigent parents in proceedings related to either custody, parental rights, or both. Of these, thirty-five states have provided for such appointment by legislative enactment.[1] Thus, only four states now require appointment of counsel for indigent parents by judicial mandate only.[2]

The analysis of these various statutes and cases and their actual application is made difficult by the fact that some states, like North Carolina, may treat custody (abuse, neglect and dependency) proceedings somewhat different than they do proceedings to terminate parental rights. North Carolina views them as two different proceedings involving differing rights, parties, and issues, and provides for their adjudication and disposition under two different statutory schemes. Other states, such as Ohio, provide for termination of parental rights as one of the possible alternative custody dispositions resulting from a determination of abuse, neglect, or dependency, in one proceeding, involving the same parties, facts, and issues. (See Appendix A). Petitioner cites as "ironic" this distinction existing in

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[1] Ala. Code §12-15-63; Ariz. Rev. Stat §8-225; Cal. Civ. Code. §237.5; Colo. Rev. Stat §19-1-106(1)(b)(II); D. C. Code §16-2304(b); Ga. Code §24A-2001(a); Haw. Rev. Stat. §802-1; Idaho Code §§16-1606(c) and 16-1608; Ill. Rev. Stat. Ch 37, §701-20(1); Ind. Code §34-1-1-3; Iowa Code §232.28; Kan. Stat. Ann. §38-820; Ky. Rev. Stat. §199.603; La. Civ. Code Ann. Art. 13:1 602; Md. Cts. and Jud. Proc. Code §3-821; Mass. Gen. Laws Ann. Ch. 119, §29; Mich. Juv. Ct. Rule 6.3 (A)(2)(b); Minn. Stat. §260.155(2); Mo. Ann. Stat. §211. 562; Neb. Rev. Stat. §43.205.06; N. H.. Rev. Stat. Ann. §604 A-1; N. M. Stat.Ann. §13-14-25-F; N. Y. Fam. Ct. Act §1043(a); N.C.G.S. §7A-587; N.D. Cent. Code §27-20-26; Ohio Rev. Code § 2151.352; Okla. Stat. Title 10, §1109; Ore. Rev. Stat. §419.498; Pa. Stat. Ann. Title 11, §50-317; S. C. Code §17-3-10; S. D. Compiled Laws Ann. §26-8-22.2; Utah Code Ann. §78-3a-35; Va. Code Ann. §16-1-266C (2); Wash. Rev. Code Ann. §13.34.090; W. Va. Code §49-6-2.

[2] Florida: Davis v. Page. 442 F. Supp 258, (S. D. Fla., 1977); Maine: Danforth v. Maine, 303 A.2d 794, (1973); New Jersey: Crist v. Division of Youth and Family Services, 320 A.2d 203 (1974); Tennessee: Smith v. Edminston, 431 F. Supp. 941, (W. D. Tenn., 1977).

North Carolina, resulting in the appointment of counsel for the indigent parent in custody, but not in termination of parental rights, proceedings (Petition, p. 13). But the difference is based on different needs, interest, legislative purpose, parties, and procedures, not irony.

For instance, under Article 44 of Chapter 7A, General Statutes of North Carolina, (See Appendix B), the Director of Social Services is required to "establish protective services for juveniles alleged to be abused, neglected, or dependent." (G.S. §7A-542). In conjunction with this, all complaints or allegations of abuse, neglect, or dependency are required to be reported to and investigated by the Director of Social Services or his staff. (G.S. §7A-543 and §7A-544). Only the Department of Social Services is authorized to file petitions for the court to hear complaints of abuse, neglect, or dependency. (G.S. §7A-561(b) . His handling of these complaints is reviewable by the state prosecutor serving the judicial district. G.S. §7A-547, and §7A-561(c). Clearly, this is a delegation of the state's parens patriae authority to protect children, and is action brought on behalf of the state initiated by the Director of Social Services for "the protection of the public safety." (G.S. §7A-516). (It was through this type of procedure that Mrs. Subler's rights were terminated by the State of Ohio. See Appendix A, ORC §2151.353) In addition, the parent is subject to criminal sanctions under G.S. §14-318.4 which makes child abuse a felony, and G.S. §14-316.1 which makes child neglect a misdemeanor. The North Carolina legislature, in consideration of these factors, has seen fit to provide indigent parents with appointed counsel in actions involving abuse, neglect, or dependency of their children. (G.S. §7A-587).[3]

On the other hand, the Director of Social Services is not mandated to bring actions to terminate parental rights. He, along with certain other individuals, may initiate such an action. G.S. §7A-289.24, entitled Who May Petition, specifies:

> "A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:
>
> (1) Either parent seeking termination of the right of the other parent; or
>
> (2) Any person who has been judicially appointed as the guardian of the person of the child; or
>
> (3) Any county department of social services or licensed child-placing agency to whom custody of

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[3] It should be pointed out that though this provision became effective January 1, 1980, it is Respondent's contention that this does not invalidate the argument that abuse, neglect, and dependency proceedings are, and should be, treated differently from termination of parental rights actions. The legislature's failure to provide it before did not violate the Fourteenth Amendment.

the child has been given by a court of competent jurisdiction; or

(4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G. S. §48-9(a)(1); or

(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition."

Clearly, this reflects the intent of the legislature to provide an elective remedy exercisable by individuals standing in loco parentis to the child, acting individually and not on behalf of the state. Even in those specified instances where the Department of Social Services is authorized to initiate a petition to terminate parental rights, it does so in loco parentis on behalf of an individual child, and not on behalf of the state as parens patriae. It is not required to do so at all.

Finally, it should be pointed out that there are no criminal sanctions associated with the termination of parental rights, so to the extent that that, along with the other analogies to state proceedings, is a basis for requiring the appointment of counsel for the indigent parent in abuse, neglect, and dependency proceedings, it would not be required in a termination of parental rights case.

If this Court is going to say that appointment of counsel is required as due process by the Fourteenth Amendment in this case, then any person whose property is foreclosed by the county for his financial inability to pay property taxes will be entitled to the appointment of an attorney in the foreclosure proceeding, otherwise, the Court will have to define interference with the parents' liberty interest in their children by individuals in civil actions as equivalent to the state's interference with an individual's personal freedom by the bringing of a criminal action, and, thus, more important than the property interest guaranteed by the Fourteenth Amendment to the individual property owner.

Though it has consistently reiterated the proposition that there is freedom of choice in family matters protected by the Due Process Clause of the Fourteenth Amendment, (e. g. Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944); Boddie v. Connecticut, 401 U.S. 371 (1971); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1973); Smith v. Organization of Foster Families for Equality

and Reform, 431 U.S. 816 (1977), this Court has never specifically ruled that it is so "fundamental" a right as to require appointment of counsel as a guarantee of due process. Every case cited in which familial matters are deemed worthy of constitutional protection has reiterated the principles that due process requires, procedurally, notice and opportunity to be heard, and substantively, that state statutes bear a reasonable, rational relationship to the ends sought, or "powerful countervailing interest . . ." to that of the parents. Stanley v. Illinois, supra, at 651. Petitioner does not challenge the statutory scheme on substantive due process grounds. Clearly the record reflects that procedurally, Petitioner had notice, was present, was heard, and cross-examined witnesses. Her claim to this Court is of a right neither explicitly or implicitly found in the Constitution, nor provided by this Court or any legislature having control over her relationship to her child.

In those states that provide for the appointment of counsel to indigent parents in termination of parental rights actions, Respondent asserts that this is an exercise of legislative prerogative based on the needs and desires of the citizens of the respective states and the statutory schemes designed to meet those needs and desires. In those states where such appointment has been judicially mandated as a due process requirement of the Fourteenth Amendment based on a conclusion that there is a fundamental right to family integrity, the decisions of this Court regarding due process in family matters have been extended too far. But this is the authority of the state judiciary in defining the law based on the needs and desires of their citizens, and the statutory schemes designed to meet those needs and desires.

In North Carolina, the legislature has decided that the needs and desires of its citizens and the statutory scheme provided for the handling of questions of abuse, neglect and dependency of children require appointment of counsel for the indigent parent in those proceedings, though not required by the Fourteenth Amendment. It has viewed the needs and desires of its citizens and the statutory scheme providing for termination of parental rights as sufficiently different so as not to require such appointment. This is the legislature's prerogative. As was recognized by this Court "[A]bsolute equality is not required; lines can be and are drawn and we often sustain them." Douglas v. California, 372 U.S. 355 at 357 (1963).

The North Carolina Court of Appeals, in considering Petitioner's claim there, correctly applied the principles of due process laid down by this Court. Petitioner cites other state decisions and statutes to point out how North Carolina is at variance with them on this issue. But this Court, in Williamson vs. Lee Optical of Oklahoma, 348 U.S. 461 (1955), per Justice Douglas stated: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." Further, Justice Douglas quoted from Munn v. State of Illinois, 94 U.S. 113 the principle that "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts." id, at 464-465.

III

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES ONLY NOTICE AND OPPORTUNITY TO BE HEARD, AND NOT APPOINTMENT OF COUNSEL, IN A PURELY CIVIL PROCEEDING TO TERMINATE PARENTAL RIGHTS.

With respect to Petitioner's assertion that the Due Process Clause of the Fourteenth Amendment entitled her to appointed counsel in this proceeding to terminate her parental rights, Respondent points out again that the Constitution does not specifically require such, and reiterates the argument that this Court has never construed it to imply such. Respondent concedes that Petitioner had an interest in her child, and that she was entitled to the due process requirements of notice and opportunity to be heard prior to termination of that interest. She does not deny that she was afforded this due process.

Throughout, and particularly in this portion of the Petition, Petitioner consistently confuses the custody of children decided in abuse, neglect, and dependency actions brought by the Department of Social Services as parens patriae pursuant to the state mandate, G.S. §7A-561(b), and the termination of parental rights as an in loco parentis procedure on behalf of the individual child pursuant to Article 24B of Chapter 7A of the General Statutes. As pointed out above, the rights, interests, and procedures of the two are sufficiently different to justify appointment of counsel in the former, and not in the latter.

By applying the balancing test prescribed by this Court in Parham v. J. R. 442 U.S. 584,99 S.Ct. 2493 (1979), Petitioner argues that appointment of counsel is the logical result. True, she had a private interest to her child,

but it was terminated, not by the state acting in parens patriae, but by action of the county Department Of Social Services standing in loco parentis as being in the best interests of the child. It was not official action in the sense implied by the Court in Parham. The termination statutes also seek to avoid any erroneous deprivation by requiring a hearing on the petition, even if the parent fails to answer, or refuses to appear, or be heard. (G.S. §7A-289.28;See Appendix C). Certainly Petitioner was given a fair opportunity to answer, appear, and be heard. The trial court heard all the evidence, including hers, and concluded that her rights should be terminated. Petitioner has not heretofore availed herself of this claim of erroneous deprivation, and Respondent asserts she should not be allowed to do so now.

Petitioner's discussion of "the inequitable balance of resources" (Petition, p. 17), again confuses the determination of abuse, neglect, and dependency of children with termination actions. Any such imbalance in termination actions is equivalent to the situation where one individual who can afford an attorney, brings a civil action to determine some issue against another individual who cannot afford counsel. The Court has never required, under these circumstances, that the court appoint the indigent an attorney. As pointed out earlier, absolute equality is not required. Douglas v. California, supra.

Respondent cites Petitioner's further confusion of abuse, neglect and dependency proceedings and termination of parental rights actions in her assertion that "the amount saved by the prevention of erroneous placement of children in foster care may pay for the appointment of counsel in such cases." (Petition, p. 24). Foster care is a usual result of removal of custody in an abuse, neglect, or dependency proceeding pursuant to Chapter 7A, Article 44. However actions are brought by the Department of Social Services to terminate parental rights to children already in its custody specifically for the purpose of clearing children for adoption by new parents who can assume the costs of their care and thus remove them from foster care. (Emphasis mine). The money sought to be saved under Petitioner's theory has, in fact, already been spent before the Department of Social Services can ever initiate a Petition to terminate parental rights. Appointment of counsel would only be added expense. The refusal of the legislature to appoint counsel in termination proceedings results not from state parsimony,

but the quite logical reluctance of the state to pay for attorneys to represent individuals in actions which the state has no direct, specified interests.

In developing the right to appointed counsel this Court originally confined its focus to criminal cases. Powell v. Alabama, 282 U.S. 45 (1932); Betts v. Brady, 316 U.S. 455 (1956); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963). More recently, the Court has approved appointment of counsel in cases denominated civil, but with characteristics of criminal proceedings. In re Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967). As a civil action more closely resembles a criminal prosecution, the more closely does the Court scrutinize the need for appointed counsel.

In no way does this proceeding to terminate Petitioner's parental rights resemble a criminal proceeding. It was not prosecuted by the state, or in the name of the state. It was a discretionary act by the custodial Department of Social Services on behalf of one minor child to realize a statutorily created right, in his best interests, to a permanent plan of care including a home, family, and parents upon demonstration that the natural parents cannot provide such a plan. This is not at all like a criminal proceeding as defined by the North Carolina Constitution, Art. IV, Sec. 13(1):

> "Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof . . . ." (See Appendix D).

Neither can termination of parental rights be considered a legal punishment against the parent. To do so is in violation of Article XI Section 1 of North Carolina's Constitution which specifies what punishments are authorized. (See Appendix D). Though the consequences may be of great significance, this alone does not make the action criminal in nature. It is, and must be, held to be purely civil in nature.

Following the guidelines of previous decisions of this Court, Respondent asserts that in this action to terminate Petitioner's parental rights, the Due Process Clause of the Fourteenth Amendment to the Constitution required that she be given notice and opportunity to be heard. The legislative enactments under which the action was brought required that, and nothing more. Appointment of counsel for Petitioner was not authorized. Clearly, she was afforded such due process as was required in this action,

and her Petition presents no additional issue of constitutional magniture to this Court.

CONCLUSION

The appointment of counsel for the indigent parent in a purely civil proceeding to terminate her parental rights is not required by the Due Process Clause of the Fourteenth Amendment. The decision whether to provide counsel or not is, therefore, the prerogative of the legislature. It is not constitutionally required to provide counsel in this instance and has not done so. Consequently, the trial court was without authority to do so, ex mero motu.

For the reasons cited herein, Respondent asserts that the decision of the North Carolina Court of Appeals is correct, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted, this the 14th day of July, 1980.

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[§ 2151.35.2] § 2151.352 Right to counsel.

A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel if he is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodians, or guardian of such child, upon written request prior to any hearing involving such child.

[§ 2151.35.3] § 2151.353 Disposition of neglected or dependent child.

If the child is adjudged an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(A) Permit the child to remain with his parents, guardian, or other custodian, subject to such conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

(B) Commit the child to the temporary custody of the department of public welfare, a county department of welfare which has assumed the administration of child welfare, county children services board, any other certified organization, the Ohio youth commission for the purpose of diagnostic study and report as provided by division (B) of section 5139.05 of the Revised Code, either parent or a relative residing within or outside the state or a probation officer for placement in a certified foster home;

(C) Commit the child to the temporary custody of any institution or agency in this state or another state authorized and qualified to provide the care, treatment, or placement that the child requires;

(D) Commit the child permanently to the county department of welfare which has assumed the administration of child welfare, county children services board, or to any other certified agency. Upon such commitment the natural or adoptive parents are divested of all legal rights and obligations due from them to the child or from the child to them.

No order for permanent custody shall be made at the hearing wherein the child is adjudicated abused, neglected, or dependent except and unless the complaint alleging the abuse, neglect, or dependency contains a prayer requesting such permanent custody and the summons served on the parents contains a full explanation that the granting of such an order permanently divests them of their parental rights.

APPENDIX B

ARTICLE 44.

Screening of Abuse and Neglect Complaints.

§ 7A-542. Protective services. — The Director of the Department of Social Services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.

Protective services shall include the investigation and screening of complaints, casework or other counseling services to parents or other caretakers as provided by the director to help the parents or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more adequate parents or caretakers, and to preserve and stabilize family life.

§ 7A-543. Duty to report child abuse or neglect. — Any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse or neglect and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give his name, address, and telephone number. Refusal of the person making the report to give his name shall not preclude the Department's investigation of the alleged abuse or neglect.

In the case of any report of abuse, the Director of Social Services, upon receipt of the report, may immediately provide the appropriate local law enforcement agency with information on the nature of the report. The law enforcement agency may investigate the report, and upon request of the Director of the Department of Social Services, the law enforcement agency shall provide assistance with the investigation.

§ 7A-544. Investigation by director; notification of person making the report. — When a report of abuse or neglect is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. The investigation and evaluation shall include a visit to the place where the juvenile resides. All information received by the Department of Social Services shall be held in strictest confidence by the Department.

If the investigation reveals abuse or neglect, the Director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the Director shall immediately provide or arrange for protective services. If the parent or other caretaker refuses to accept the protective services provided or arranged by the Director, the Director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the Director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 46 of this act.

§ 7A-561. Receipt of complaints; filing of petition. —

(b) All complaints concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the Director of the Department of Social Services for screening. Thereafter, if it is determined by the Director that a complaint should be filed as a petition, the petition shall be drawn by the Director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

(c) All complaints, and any decision of the intake counselor or of the Director of Social Services not to authorize that a complaint be filed as a petition shall be reviewed by the prosecutor pursuant to G.S. 7A-536 or G.S. 7A-547. If the prosecutor, after making his review, shall authorize a complaint to be filed as a petition, he shall prepare the complaint to be filed with the clerk as a petition, recording the day of filing.

§ 7A-516. **Purpose.** — This Article shall be interpreted and construed so as to implement the following purposes and policies:

(1) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety;

(2) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents; and

(3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety.

§ 14-316.1. **Contributing to delinquency and neglect by parents and others.** — Any person over 16 years of age who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7A-517 shall be guilty of a misdemeanor.

It is not necessary for the district court exercising juvenile jurisdiction to make an adjudication that any juvenile is delinquent, undisciplined, abused, or neglected in order to prosecute a parent or any person, including an employee of the Department of Human Resources under this section. An adjudication that a juvenile is delinquent, undisciplined, abused, or neglected shall not preclude a subsequent prosecution of a parent or any other person including an employee of the Division of Youth Services who contributes to the delinquent, undisciplined, abused, or neglected condition of any juvenile.

§ 14-318.4. **Child abuse a felony.** — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:

(1) Permanent disfigurement, or
(2) Bone fracture, or
(3) Substantial impairment of physical health, or
(4) Substantial impairment of the function of any organ, limb, or appendage of such child,

is guilty of a felony punishable by imprisonment for a period not to exceed five years.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

§ 7A-587. **Parent's right to counsel.** — In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right.

§ 7A-289.28. Failure of respondents to answer. — Upon the failure of the respondents to file written answer to the petition with the court within 30 days after service of the summons and petition, or within the time period established for a defendant's reply by G.S. 1A-1, Rule 4(j)(9)c if service is by publication, the court shall issue an order terminating all parental and custodial rights of the respondent or respondents with respect to the child; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition.

Sec. 13. *Forms of action; rules of procedure.*

(1) *Forms of Action.* There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury. Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof, shall be termed a criminal action.

Section 1. *Punishments.* The following punishments only shall be known to the laws of this State: death, imprisonment, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.